

10 Official Opinions of the Compliance Board 35 (2016)

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***Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at http://www.oag.state.md.us/Opengov/Openmeetings/OMCB_Topical_Index.pdf**

May 9, 2016

Re: Queen Anne’s County Board of Education
David Brown, Bryan Holocker, Angela Price- The Bay Times

In three separate complaints, Angela Price of The Bay Times, David Brown, and Bryan Holocker allege that the Queen Anne’s County Board of Education (“school board”) violated the Open Meetings Act in various ways with regard to closed meetings held on January 20, 2016, and February 9 and 10, 2016. We have consolidated the complaints.

The complaints variously allege that the school board did not give notice for its February 9, 2016 special meeting, as required by § 3-302,¹ did not close the meeting by a publicly-held vote, as required by § 3-305(d), did not provide the requisite information before closing the meeting, also as required by § 3-305(d), and did not make all of the required disclosures about three closed sessions in the minutes of its next open meeting, as required by § 3-306(c)(2).

¹ Statutory references are to the General Provisions Article (2014, with 2015 supp.) of the Maryland Annotated Code, where the Act is codified.

As explained below, we find that the school board violated the Act in each regard. We will state the facts as they become relevant.

Notice

Complainants allege that the February 9, 2016 meeting was not mentioned either on the school board's online meeting schedule or in the agendas posted online with the school board's meeting documents. Complainants further state that the school board met in closed session that day to discuss the superintendent's contract and that members of the public came to the school board's February 10 and March 2 meetings to comment on the subject, only to learn later that the school board had already decided the matter on February 9.

By its counsel, the school board has described the measures taken to notify the public of its intent to meet on February 9. On January 20, the school board's communications specialist received a request to post notice for the February 9 meeting. The date of the actual posting is unclear. A screenshot of the school board's home page, as randomly cached on February 7, shows this entry under the "Upcoming Events" heading: "Closed Session Board Meeting: 02/09/16 – 9-10 a.m." The school board's exhibits suggest that it does not know when that language was posted because notices are taken down after 30 days, the lack of an earlier random cache does not mean that the notice was not posted earlier, and apparently no record was kept of the posting date. The response itself assumes a posting date of February 7, a Sunday. Additionally, on February 2, the communications specialist emailed an events calendar to the press, including one of the complainants, and to other recipients, including the Kent Island PTA. The entry for February 9 is "Closed Board meeting 9-10 a.m."

We see that the school board provides meeting information in at least five places on its website. First, under "Announcements," there is a link to the "2015-2016 Board Meeting Schedule." That schedule, the most logical place to look for meeting notices, shows various additions and other edits but does not list the February 9 meeting. Second, under "Site Shortcuts," there is a link to "BOARD DOCS: Meeting Info/Agenda/Minutes," which leads to a list of "Active Meetings." The board documents list specifies four February meetings but does not include the February 9 meeting. Third, the tab for the "Board of Education" leads to a welcome page with a link to "Watch BOE Meetings Online." The schedule of meetings videos does not include the February 9 meeting. Fourth, there is an "Events Calendar." As noted above, the entry for February 9 is "Closed Board meeting 9-10 a.m." Finally, the home page prominently displays "Upcoming Events." The entries in that section are not links; they simply provide the dates of future meetings.

The Act requires public bodies to give "reasonable advance notice" of their meetings and to include the meeting date, time, and place. § 3-302 (a), (b). We therefore will look to the timeliness, content, and method of the notice that was given. Timeliness and method are often related issues. Specifically, if time allows, public bodies should use their usual methods so

that the public knows where to look, and, if time does not allow, public bodies must give the best notice feasible under the circumstances. The test is reasonableness. *See* Open Meetings Act Manual (November 2015) Chapter 2, §§ A and C (summarizing our opinions on timeliness and method). Consistency is important, and a sudden change in the way in which a meeting is posted, unaccompanied by an obvious change in website design, can be unreasonable. Additionally, a public body that intends to close its meeting under § 3-305 must give notice of the public meeting that must precede the closed session, as § 3-305(d) does not permit the public body to exclude the public until the members have voted, in public, to take that action. *See* Open Meetings Act Manual (November 2015), Chapter 5 (explaining the Act's closed-session requirements).

Here, the public could fairly wonder why the February 9 meeting notice was posted neither on the Meeting Schedule, which provides the required information on the date, time, and place of the school board's meetings, nor on the board documents list, given that the school board knew about this meeting as early as January 20. However, whether or not the "Upcoming Events" and events calendar postings were timely and reasonable substitutes for the usual methods, neither posting invited the public to attend the meeting, and so neither was sufficient under the Act. In fact, by describing the meeting as "closed," both postings implicitly told the public *not* to attend. Moreover, had the February 9 session been listed on the Meeting Schedule, the form language on that schedule would also have conveyed the message that the meeting would be "closed."² We note also that the two online postings did not specify the location of the meeting, and so they additionally did not satisfy § 3-302(b)(2).

In sum, we conclude that the school board did not provide reasonable advance notice when it posted the fact of a "Closed Session Board meeting" without specifying the meeting location and without inviting the public to observe the requisite open-session vote. Further, we urge public bodies that post website notices temporarily to keep a record of the dates on which they post their notices.

Publicly-held vote to meet in closed session

Section 3-305(d) requires the presiding officer, in open session, to conduct the vote to close the meeting, just as § 3-301 generally requires public bodies to conduct their business in open sessions, except as expressly

² The Meeting Schedule states: "All Board of Education Meetings start at 6:00 pm. Closed Sessions generally start at 4:30PM." The school board's regular notices thus also convey the message that the public is not invited to observe the school board's vote to close its meetings. That might not be the school board's intent: the written minutes of the 4:30 session on February 10, for example, begin with the title "Open Session," and the video recording of the meeting, available online, shows the vote. For suggested wording for notices of meetings that will be closed except for the public vote, we refer the school board to 8 *OMCB Opinions* 150, 158 (2013).

permitted by the Act. It is hard to describe a session as “open” if the public was not invited to observe the vote. The posting of the February 9 session as “closed” thus caused a violation of § 3-305(d) as well as the notice provisions. The school board had also voted during its January 20 closed session that it would meet in closed session on February 9. That vote did not meet § 3-305(d), for two reasons: it, too, was not held publicly, and, in any event, the vote must be held at the open session that is about to be closed and may not be held in advance.

Written closing statement

Section 3-305(d) provides that a public body may not meet in closed session until the presiding officer not only has conducted a vote on a motion to close, but also has prepared a “written statement” of the basis for the closing. The written statement must disclose three items of information: the statutory authority for the closed session, the topics to be discussed, and the “reason for closing.” § 3-305(d)(2). We have explained that written statements may be pre-prepared for the presiding officer, so long as the presiding officer ensures their accuracy at the time of the vote to close. *See* Open Meetings Act Manual 39 (summarizing our advice on the preparation of closing statements).

The school board provided us with the typed written statement for the February 9 closed session and also for its closed sessions on January 20 and February 10. The form that the school board uses provides spaces for the three items of required information. The school board adequately disclosed the first two items of information. On all three forms, however, the entry under the “reason for closing”—“No further business to discuss”—reflects a misunderstanding about the Act requires. Closing statements are to convey the public body’s reason for excluding the public, not its reason for its later adjournment of the closed session. *See id.* at 38 (summarizing our advice on the functions of closing statements).

We note also that the closing statements contain typed entries that reflect the time at which the closed session ended, and it thus is not apparent from the statements that any of the information was entered before the meeting was closed. We advise public bodies to retain a copy of the closing statement as it appeared at the time of the vote to close, in case someone questions whether it was properly prepared in advance, and in case an objection by a member of the public requires the public body to send a copy to us. *See* § 3-305(3), (4), (5). We also recommend that the motion to close expressly state all of the information on the closing statement, so as to assure the public that the members have knowingly adopted the stated basis for meeting behind closed doors. The school board states that it will now do this.

Summary of closed session in minutes of next open session

After a public body has met in a session closed under § 3-305, the public body must disclose four sets of information in the minutes of its next

open session. Section 3-306(c)(2). The minutes of the February 10 open session contain a summary of the closed meeting held that day, but not of the closed session held the day before. The school board concedes that it did not summarize the events of the February 9 closed session in the minutes of its February 10 open meeting and recognizes that its failure to do so violated the Act.

Complainant Price alleges also that the school board also has not disclosed all of the information required by § 3-306(c)(2). Specifically, she states, public bodies must disclose the “persons present” at their closed sessions, and the school board has failed to do that in its summaries for the January 20, February 9, and February 10 closed sessions. The school board admits that its closed session summaries have not listed the “persons present.” The school board asserts that the fact that all of the board members attended the sessions is apparent from the vote totals. However, minutes that reflect the presence of all of the school board members do not tell the public who else attended (or who did not attend), and so the “persons present” must be listed expressly. The form closing statement posted on the open meetings webpage on the Attorney General’s website includes a worksheet that might be helpful in this regard.

Conclusion

We have concluded that the school board violated §§ 3-302, 3-305(d), and 3-306(c)(2) of the Act, and we have provided advice on how to comply with those provisions.

Open Meetings Compliance Board

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